NATIONAL ORGANIZATION OF VETERANS' ADVOCATES, INC.

Prepared Statement

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Before the

Committee on Veterans' Affairs

U. S. House of Representatives

Subcommittee on Disability Assistance and Memorial Affairs

"Veterans' Dilemma: Navigating the Appeals System for Veterans Claims"

January 22, 2015

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On behalf of the National Organization of Veterans' Advocates, Inc. (NOVA), I would like to thank the Subcommittee Chairman and Ranking Member for the opportunity to share our views and offer solutions for this hearing.

The National Organization of Veterans' Advocates, Inc. (NOVA) is a not-for-profit 501(c)(6) educational membership organization incorporated in the District of Columbia in 1993. NOVA represents more than 500 attorneys and agents assisting tens of thousands of our nation's military veterans, their widows, and their families to obtain benefits from the Department of Veterans Affairs (VA). NOVA members represent Veterans before all levels of the VA's disability claims process. In 2000, the United States Court of Appeals for Veterans Claims recognized NOVA's work on behalf of Veterans with the Hart T. Mankin Distinguished Service Award. NOVA currently operates a full-time office in Washington, D.C.

NOVA has a unique perspective based on more than 20 years of collective experience in representing veterans and their families in appealing decisions of the VA. NOVA hopes to assist the Committee in understanding the VA's troubled appeals process for veteran's claims, including the long ignored systemic problems that contribute to the backlog of appeals.

It would be helpful in NOVA's judgment to begin by reviewing the statistics which have been provided to Congress from both the Board of Veterans' Appeals and the United States Court of Veterans Claims. The statistics cited by NOVA have been obtained from the Board's website from the Chairman's Annual Reports to Congress at http://www.bva.va.gov/Chairman_Annual_Rpts.asp and the Court's website from the Court's Annual Reports from Congress at http://www.uscourts.cavc.gov/report. php. The Chairman's Annual Reports cover the period from 1991 to 2013. The Court's Annual Reports cover the period from 1998 to 2013. These reports objectively identify the number of decisions made by the VA which were annually remanded by the Board as well as the number of decisions made by the Board which were reversed or remanded by the Court to the Board.

Looking at the entire period, the average number of cases decided by the Board from 1991 through 2013 is 36,640. However, in the period from 2007 through 2013, the average number of cases decided by the Board has been increased to 45,227. The average number of cases remanded by the Board from 1991 through 2013 is 39.5%. In the period from 2007 through 2013, the average number of remand orders by the Board has increased to 41.1%, demonstrating that the Board has consistently been required to remand approximately 40% of the cases appealed to the Board. This means that when a case has been appealed to the Board, 4 out of every 10 cases must be returned to the VA for further development. In other words, the VA adjudication process consistently produces only 60% of the appealed cases ready for administrative appellate review and this has been the situation from 1992 through 2013. NOVA submits that this consistent result demonstrates that the VA is not fully and sympathetically developing cases before they were decided on the merits.

When Congress enacted Judicial Review in 1988, it did so with the clear intent to maintain a

beneficial non-adversarial system of veterans benefits. The legislative history indicates:

> *I[m]plicit in such a beneficial system has been an evolution of a completely ex-parte system of adjudication in which Congress expects [the DVA] to fully and sympathetically develop the veteran's claim to its optimum before deciding it on the merits. Even then, [the DVA] is expected to resolve all issues by giving the claimant the benefit of any reasonable doubt.* In such a beneficial structure there is no room for such adversarial concepts as cross examination, best evidence rule, hearsay evidence exclusion, or strict adherence to burden of proof.

H.R. Rep. No. 100-963, at 13 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5782, 5794-95 (emphasis added). Congress made clear its expectation that the VA would "fully and sympathetically develop the veteran's claim to its optimum before deciding it on the merits." The statistics from the Chairman of the Board of Veterans' Appeals Annual Report confirms that this expectation has not been fully met by the VA as demonstrated by the VA's appeal process which has been unable to "fully and sympathetically develop the veteran's claim to its optimum before deciding it on the merits" in 4 out of every 10 cases appealed to the Board since 1992 through 2013. Based on these statistics, even though the Board is able to adjudicate 60% of the cases appealed, it is not able to adjudicate 40% because the VA failed to fully and correctly develop the claim to its optimum before deciding the claim on its merits. Therefore, the Board is only able to decide 6 out of every 10 cases because the other 4 cases must be remanded to the VA to undertake the development which should have been done **before** the VA decided the claim on its merits. The VA's appeal process is not working because of the delays in deciding appeals, because the Board must remand to the VA for further development before remanded cases can be decided by the Board.

The VA's failure to "fully and sympathetically develop the veteran's claim to its optimum before deciding it on the merits" is also demonstrated by the statistics which have been annually reported by the United States Court of Appeals for Veterans Claims from 1998 through 2013 concerning cases appealed from the Board to the Court.

The average number of cases decided by the Court from 1998 through 2013 is 3,277. In the period from 2007 to 2013, the average number of cases decided by the Court has been 4,473. The average number of cases remanded by the Court to the Board from 1998 to 2013 is 1,887 remands per year, meaning that these cases must be readjudicated by the VA in whole or in part. This means that in more than 50% of the cases decided at Court the result is a remand for readjudication. In the period from 2007 to 2013, the average number of cases remanded per year was 2,551. The percentage of remands has remained the same – more than 50% of the cases decided at Court result in a remand for readjudication.

The average percentage of remands from the total number of cases decided by the Court annually from 1998 to 2013 is 56.9%. This means that of the total cases decided each year by the

Court or by agreement with the VA more than one half are remanded. In the period from 2007 to 2013, the average percentage of remanded cases from the total number of cases decided by the Court was 57.4%, demonstrating that as a percentage of the total number of cases decided by the Court annually, the percentage of cases remanded has been consistent. These statistics demonstrate that of the cases appealed from the Board to Court which are decided by the Court or resolved by agreement more than half of those cases are returned to the Board for further proceedings.

The statistics from both the Board and the Court confirm the VA's failure to "fully and sympathetically develop the veteran's claim to its optimum before deciding it on the merits" is the consistent reason for remands. The appeals process is not operating efficiently because at the Board 4 out of every 10 cases are remanded and at the Court more than 50% of the cases result in remands. These statistics clearly show that the VA's appeal process is significantly delayed because the VA does not in the first instance fully and sympathetically develop the claim.

According to the Annual Reports of the Chairman of the Board of Veterans' Appeals from 1992 to 2013, the total processing time for an appeal, meaning from the date of the VA's receipt of the notice of disagreement to the final Board decision including the average remand time factor, has increased from a low in 1992 of 519 days, which is approximately 1 year and 5 months, to a high of 1,698 days, which is more than 4 ½ years, in 2012. The average total processing time for an appeal for the period from 1992 to 2013 is 1,159 days, which is more than 3 years. Included in these statistics from the Board is an average remand time factor which was as low as 30 days in 1992 to a high of 539 days which is nearly 1 ½ years, in 2009. In fact, from 1992 through 2008, the highest average remand time factor reported by the Board was 190 days, a little more than 6 months, in 2006. For the period from 2009 to 2013, the average remand time factor reported by the Board was 450 days, which is approximately 1 year and 3 months.

A careful examination of the processing time statistics in the Chairman of the Board's Annual Report to Congress reveals that the choke point causing the delays in processing appeals occurs in the time interval between the VA's receipt of the substantive appeal to the certification of the appeal to the Board. The average time for this interval as reported is from a low in 1992 of 192 days or just more than 6 months to a high in 2002 and 2004 of 790 days or more than 2 years. The average time for this interval as reported from 1992 to 2013 was 548 days or approximately 18 months.

Following receipt of a timely substantive appeal, the agency of original jurisdiction will certify the case to the Board of Veterans' Appeals. Certification is accomplished by the completion of VA Form 8, "Certification of Appeal." The certification is used for administrative purposes and does not serve to either confer or deprive the Board of Veterans' Appeals of jurisdiction over an issue. *See* 38 C.F.R. § 19.35. The official docket date of a case before the Board is assigned when the case is physically received at the Board of Veterans' Appeals. Even though the docket date is still based on the date the appellant's substantive appeal (VA-9) was received by the VA, it is no longer assigned at the VA or at the time the signed VA-9 is received. Report of the Chairman, Board

of Veterans' Appeals, Fiscal Year 2008 at 9. This delay is particularly troubling because the task of certifying an appeal and transferring the claims file to the Board is not a time-consuming process. All that is required by the VA is preparation of a VA Form 8, which merely lists the issues that have been appealed, as well as the rating, appeal, and hearing history. Veterans Benefits Manual 2013 Edition, Part V, The VA Claims Adjudication Process, Chapter 13, Board of Veterans' Appeals, Section 13.7 Transfer of the VA claims file from the regional office to the Board. The "certification of appeal," or VA Form 8, is the VA prepared document identifying the claims that have been perfected for appeal. The VA prepares the form just before the transfer of the claimant's VA claims file to the Board of Veterans' Appeals in Washington, D.C. The form is not sent to the veteran or claimant, but it does become a permanent part of the VA claims file. Veterans Benefits Manual 2013 Edition, Part V, The VA Claims Adjudication Process, Chapter 13, Board of Veterans' Appeals, Section 13.9.3.1 The significance of VA Form 8.

It is difficult to understand why or how it could take the VA more than 30 days to complete a VA Form 8 when all that is required to complete this form is to list the issues that have been appealed, as well as the rating, appeal, and hearing history. Yet since 1992, according to the Chairman of the Board's Annual Report, it has taken the VA on average approximately 18 months to certify appeals to the Board and as long as more than 2 years. The appeals process is compromised when decisions on appeals are delayed.

NOVA has three suggestions to Congress concerning the systemic problems which contribute to the backlog in deciding appeals. First, NOVA recommends that Congress make a substantive statutory change by amending the provisions of 38 C.F.R. § 7105 by eliminating the redundant requirements of a statement of the case and a substantive appeal. Second, even if Congress does not amend § 7105 to eliminate the need for a statement of the case and a substantive appeal, Congress should amend § 7105 to require that the VA certify and transfer a claims file in an appeal to the Board no later than 60 days after the VA's receipt of a substantive appeal. Third, Congress should amend the provisions of 38 U.S.C. § 5109B and the provisions of 38 U.S.C. § 7112 in order to ensure expeditious treatment of remands from the Board and from the Court.

Why the provisions of 38 C.F.R. § 7105 should be amended to eliminate the need for a statement of the case and a substantive appeal.

As a result of judicial review, the need for a statement of the case and an affirming substantive appeal no longer exist. Prior to the enactment of judicial review, the Board of Veterans' Appeals was the only appellate review of VA decisions on benefits. With the enactment of the Veterans Judicial Review Act in 1988, the decisions of the VA are subject to review by the United States Court of Appeals for Veterans Claims and the decisions of that Court are reviewed by the United States Court of Appeals for the Federal Circuit.

The delay attendant with the VA's preparation of a statement of the case and the claimant's need to reaffirm the desire to appeal according to the 2012 GAO report adds 460 days from notice of

disagreement to statement of case and 560 days from VA's receipt of the claimant's substantive appeal to the VA's certification of the appeal to the Board. Amending § 7105 would significantly decrease the appeal process timeframe by having a single process for initiating and completing an appeal. The goal should be to get a veteran or claimant's appeal to the Board as soon as possible.

An amendment to § 7105 would need to incorporate into the statutory scheme the current regulatory decision review process which affords a veteran or a claimant the option for a *de novo* review before a review by the Board. The statutory incorporation of the decision review process would permit the VA regional offices to identify and correct decisions before they were certified to the Board. This procedure allows for a critical second look at the VA's first decision before the appeal is certified to the Board. The individuals who are assigned to do such decision reviews are the VA's most experienced adjudicators. This current decision review process exists only by VA regulation and can be withdrawn at anytime. This process should be statutory because it is effective in getting a decision changed without the need for review by the Board.

Amending § 7105 to eliminate the need for a statement of the case and a substantive appeal would meaningfully expedite the VA's appeal process. The removal of the requirements for the preparation of a statement of the case and second appeal notice (substantive appeal) by the claimant will allow the VA to complete the appeal process in significantly less time. The decrease in the time required to obtain a decision from the Board on an appeal is of more benefit to veterans and claimants than the receipt of a statement of the case and the filing of a substantive appeal. With the advent of judicial review, the need for a statement of the case and the filing of a substantive appeal no longer exists. An amendment eliminating the need for a statement of the case and the filing of a substantive appeal will enhance the need for the VA to comply with the notice requirements of a detailed explanation of its decisions as contemplated by the provisions of 38 U.S.C. § 5104(a) and 38 C.F.R. § 3.103(b).

The current processing of appeals is impeded by required delays mandated by the current version of § 7105. These requirements unnecessarily delay the time it takes to obtain a final decision by the Board as well as to obtain judicial review of final Board decisions. The VA appeal process would be enhanced by streamlining the statutory appeal requirements proposed here by as much as 3 years.

Why the provisions of 38 C.F.R. § 7105 should be amended to explicitly require the VA to certify and transfer an appeal from the regional office to the Board.

Currently, there is no statutory timeframe for the VA to certify a completed appeal from the VA regional office and to transfer the claims file to the Board for consideration of an appeal. As a result, appeals are languishing at VA regional offices from a low average of 192 days to a high average of 790 days before an appeal is certified and transferred to the Board. We recommend that Congress should require by statute that VA regional offices certify and transfer all completed appeals to the Board of Veterans' Appeals within 60 days of the VA's receipt of a substantive appeal from

the veteran or the claimant. This is a simple statutory fix which will ensure that after 60 days a completed appeal will be certified and transferred to the Board.

Additionally, this amendment would allow for better tracking of appeals because all appeals would be required by statute to be certified and transferred to the Board within 30 days of the completion of the appeal by the veteran or claimant. This statutory change would also allow the Board to report to Congress on the number of appeals certified each year from the VA regional offices. This would result in a more accurate assessment of the number of appeals received by the Board annually.

A further benefit to veterans and other claimants appealing decisions of the VA would be the establishment of an indisputable right to the certification and transfer of a completed appeal to the Board. This would permit veterans and other claimants appealing decisions of the VA to initiate petitions for extraordinary relief with the United States Court of Appeals for Veterans Claims to compel the VA to certify and transfer a completed appeal to the Board after more than 60 days had lapsed following the completion of the appeal. A statutory mandate allows veterans and other claimants a means to compel the VA to act when the VA fails to act in accordance with law.

The need for amendments of the statutory provisions requiring expeditious treatment of remands.

In 2003, Congress enacted the provisions of 38 U.S.C. § 5109B and 38 U.S.C. § 7112. Section 5109B requires the VA to expedite the treatment of remands from the Board. Section 7112 requires the Board to expedite the treatment of remands from the Court. These statutes as currently written do not define the term "expeditious treatment." The term "expeditious treatment" is ambiguous and unclear. Congress needs to provide a clear statutory expectation for what is meant by the "expeditious treatment" of remands. Without this clarity, the Board and the VA are under no clear statutory direction as to when a remand from the Board or the Court needs to be processed. Delays in the processing of remands would be significantly reduced by amending these statutes to provide specific expectations.

NOVA believes that Congress should consider specific amendments to these statutes as follows: First, Congress should provide in each statute that remanded cases should be addressed by special teams at the Board and the VA regional offices whose responsibility is to expedite the instructions in remanded cases. Second, Congress should provide in each statute that remanded cases should be addressed and resolved within 6 months of the date of the remand. Further, that in the event that a remand can not be resolved within 6 months of the date of the remand, the Board or the VA regional office will be required to inform the veteran and his or her representative of the reasons for the delay. Within that notification, the Board or the VA regional office should provide a timetable for the anticipated resolution of the remand not to exceed a second 6-month period.

NOVA appreciates that these recommendations may be perceived as micro management of the appeals process. However, requiring communication explaining the reasons for the delays in the resolution of cases remanded by both the Court and the Board will ensure that attention is in fact being given to remands. *Groves v. McDonald*, 2015 WL 128172, Vet.App., January 09, 2015 (NO. 14-0269)(addressing lack of agency action on remand, ordering the Secretary to pay sanctions in the form of reasonable expenses associated with the litigation). The current statute's promise of "expeditious treatment" of remands has been unfulfilled for more than a decade because of the lack of clarity in the meaning of the term "expeditious treatment." It is evident to NOVA that without a clear and unambiguous expression of Congress' intent, remands will continue to be delayed by the VA and the Board and result in continuing delays in processing appeals.

Third, Congress should require that the Chairman of the Board of Veterans' Appeals include in his or her annual report to Congress the number of cases resolved by the Board on remand from the Court within 6 months; the number of cases resolved by the Board on remand from the Court in more than a year, 18 months, and 2 years or more with an explanation for why these remands were not resolved within 6 months. In addition, the Chairman of the Board should include in his or her annual report to Congress the number of cases resolved by the VA regional office on remand from the Board within 6 months, a timeline which NOVA believes is more acceptable under the statutes. The report should also include the number of cases resolved by the VA regional office on remand from the Board of a year, 18 months, and 2 years or more with an explanation for why these remands were not resolved within 6 months. Such reporting will give Congress the information necessary to assess whether remands are being expeditiously handled by the VA and the Board.

Current statutory mandate merely states: "The Secretary [and the Board] shall take such actions as may be necessary to provide for the expeditious treatment …." The phrase "expeditious treatment" is ambiguous, yet the VA has made no effort to interpret this ambiguity in regulation. There must be accountability. Only clarity of the Congress' expectations can resolve this ambiguity. Congress should resolve the ambiguity of the phrase "expeditious treatment" to ensure that both the Board and the VA regional offices are accountable. Accountability will only occur if Congress is willing to amend these statutes to make clear that resolving remands must be given priority over pending appeals.

Remands are a result of the VA's failure to "fully and sympathetically develop the claim **before** deciding it on the merits." Congress must reaffirm its commitment to veterans and their families that Congress expects the VA to get it right the first time. Getting VA decisions right the first time is possible **only** when the VA fully and sympathetically develops every claim to its optimum **before** deciding every claim on the merits. Eliminating or at least minimizing delays can be accomplished by the Congress' adoption of NOVA recommendations.

NOVA hopes that these suggestions will be of assistance to this Committee and to Congress.

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He is the President of Carpenter Chartered, a professional legal corporation. Carpenter Chartered began doing pro bono representation of disabled veterans in 1983. The primary focus of the firm's representation is with the psychiatrically disabled veteran, predominantly veterans with post traumatic stress disorder. The firm also specializes in cases involving total disability ratings and earlier effective dates. The firm also does requests for revisions based on allegations of clear and unmistakable error and survivor claims for dependents of veterans.